

Testimony on Senate Bill 44
Senate Committee on Judiciary
February 8, 2010

Thank you Chair Taylor and committee members for hearing this important legislation.

Senate Bill 44 (and companion bill AB 70) would require handgun background checks to access mental health information that would prohibit a handgun purchase under current federal law.

This bill is identical to 2007 Senate Bill 216 and 2007 Assembly Bill 424 as amended by amendments 1 and 2 to those bills. As amended, in the last session this legislation passed the Assembly on a voice vote, and was recommended for passage by the Senate Committee on Judiciary on a 5-0 vote.

The substitute amendment before you today, suggested by Legislative Council staff, merely eliminates some redundancies and obsolete references, as described in the final paragraph of the LRB analysis. Last week, the Assembly Committee on Criminal Justice adopted an identical substitute amendment, and recommended the bill for passage as amended on a 10-0 vote.

This bill requires the Wisconsin Circuit Court Access Consolidated Court Automation Programs (CCAP) to provide the necessary information to the Wisconsin Department of Justice (DOJ), which in turn provides the information to the National Instant Criminal Background Check System (NICS).

This provision strengthens background checks for handgun purchases by closing a loophole that has existed for years. Federal law prohibits an individual with an involuntary mental health commitment from possessing firearms, yet Wisconsin does not make that information available when background checks for handgun purchases are performed.

This legislation was prompted largely by the 2007 shootings on the campus of Virginia Tech. The shooter would likely have been prohibited under federal law from purchasing firearms, but Virginia law did not accurately address the issue. At that time, only 23 states submitted any information to the NICS system. That number has since increased, yet Wisconsin is still not one of them. We must ensure that prohibited purchasers can't buy a handgun in Wisconsin because of a loophole that should have been fixed years ago.

- This bill will keep people who are prohibited for mental health reasons under state and federal law from buying handguns.
- This bill makes information required under current federal law available on a NICS handgun background check.
- This bill does not create any new prohibitions for gun purchases; rather, it simply makes information available to DOJ and NICS that is required under law.

Capitol Office:

District Office:

• Amendments to the 2007 legislation – incorporated in SB 44 – address privacy concerns brought forth by advocates for individuals with mental illness.

On January 8, 2008, President Bush signed into law the NICS Improvement Act (HR 2640), a law that provides \$250 million annually to states that implement laws such as SB 44. This bipartisan bill, supported by the NRA, guides participating states how to provide relevant and accurate records to the FBI. The new law takes a carrot-and-stick approach to get states to report people who are ineligible to buy guns. It authorized up to \$250 million a year for five years to states to help pay the cost of providing the records, and threatens to withhold federal anti-crime funds if the states fail to act.

After the Virginia Tech massacre, the US Department of Justice wrote an open letter to every state's Attorney General on May 9, 2007 identifying what steps should be taken to ensure states' compliance with federal law. The letter from the US DOJ is clear in its directive to the states: "ATF and our FBI partners who operate the NICS system are encouraging State authorities to take the necessary actions to ensure that all disqualifying information is provided to prevent the purchase of firearms by those prohibited from possessing firearms under Federal law."

The 2007 legislation was supported by the Wisconsin Chiefs of Police Association, the National Rifle Association, the Milwaukee Police Association, and the University of Wisconsin Police Chief.

We worked closely last session with the Department of Justice to alleviate several concerns brought to us by Mental Health America of Wisconsin:

- 1. Minimal information is transmitted to NICS from DOJ, and none that identifies a prohibited purchaser as an adjudicated mental defective. This was a concern of the MHA and the bill, as written, ensures this.
- 2. Information about those adjudicated as a mental defective is not used for anything other than for background check purposes under this law. No other person can access or transmit this information for any other reason. Our bill, as written, ensures this.
- 3. We make clear that DOJ shall convey information to NICS regarding the cancellation of any such prohibition order against a person. This allows a person's name to be removed once they no longer present a danger. Federal law already guarantees this process will happen, but writing it into statute will doubly ensure it.

Another frequently asked question refers to the privacy issue of the records being released. It is true that current law prevents the Department of Justice from sharing mental health information because such records are confidential under the Mental Health Act. There are exceptions to this Act, and our bill creates another exception to allow the courts to communicate that information to DOJ.

We clearly have the need for this bill, and now we have the funding from the federal government. It's time for Wisconsin to get this done. Thank you for your time today.



Testimony on Senate Bill 44

Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform and Housing

Shel Gross, Director of Public Policy Mental Health America of Wisconsin

Mental health consumers and advocates are always concerned about anything that seems to perpetuate inaccurate stereotypes about the potential for people with mental illnesses to be violent. Research has consistently shown that mental illness alone does not increase the likelihood of violent acts, although mental illness in combination with substance abuse disorders does. Additionally there is a concern that laws requiring reporting of persons with mental illnesses may result in individuals being less likely to seek treatment.

Having said this I also recognize that federal law already requires States to report to the National Instant Criminal Background Check System (NICS). And I recognize that not only do a significant number of people with mental illness also have substance abuse disorders, but that the danger they pose is very often to themselves. Over 700 people in Wisconsin die by suicide each year; about half of them involving firearms. Because reducing access to lethal means is an evidence-based approach to reducing suicide, I do believe that prudent measures to limit access to handguns by persons experiencing serious episodes of mental illness are appropriate.

When this bill was introduced in the last session I provided comments to Sen. Darling about changes that would not limit the ability of the bill to accomplish its goals but would minimize the possibility that it would inadvertently stigmatize individuals with mental illness who might be subject to its requirements. These included:

- The State should ensure that the information sent to the NICS is limited to basic identification data (name and address) and that information indicating that the person has a mental illness, their diagnosis or treatment is never sent.
- Consistent with the data accuracy and integrity provisions of the NICS regulations, the State should inform the NICS to remove the person's name when that person no longer meets the conditions initiating placement on the NICS.
- Consistent with the restricted-access provisions of the NICS regulations the State should prohibit any entity that handles the transmission of this data from sharing the information with anyone who does not have a need to access such information.

My reading of the bill suggests that these issues have all been addressed. I thank Sen. Darling for her responsiveness to these concerns.

With these modifications Mental Health America of Wisconsin is able to support the bill.

www.mhawisconsin.org

Statement to the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing

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February 8, 2010

Subject: SB 44 (AB 70) - Firearm Background Check Records and Relief of Disabilities Program

WAVE Educational Fund supports SB 44; however, we raise the following issues for your consideration:

Many other states have already passed laws similar to SB 44. Although the laws vary from state to state, there appears to be some common language in many of these other state laws, which SB 44 does not contain.

- 1) Related to the process in which an individual may petition the court to cancel an order prohibiting the possession of firearms, other states explicitly place the burden of proof on the petitioner.

 (It is possible that 51.20(13)(e), which stipulates that "the petitioner has the burden of
- (It is possible that 51.20(13)(e), which stipulates that "the petitioner has the burden of proving all required facts by clear and convincing evidence," will apply to those individuals who are seeking relief under 51.20(13)(cv) lm. a.)
- 2) Other states specify that people found not guilty by reason of insanity or those found incompetent to stand trial at a criminal proceeding are disqualified from petitioning the court to cancel the firearm prohibition order.
- 3) Mindful of the court costs, other legislatures require a certain amount of time to lapse (eg, one year) before the petitioner may seek a new appeal.

Finally, one of the primary objectives of this bill is to help identify one of the types of high-risk individuals who are prohibited from purchasing or possessing firearms. It does so by making certain that appropriate mental health information can be included as part of a gun-purchasing background check. Unfortunately, the effectiveness of SB 44 will be limited because currently in Wisconsin, nearly half of all gun sales are conducted in an unregulated, secondary market by unlicensed sellers and private individuals, who do not conduct background checks on their prospective purchasers. For SB 44 to be effective and achieve its desired goals, we strongly suggest that the legislature seek to close the loophole that allows guns to be sold with no background check.

Respectfully,

Jeri Bonavia WAVE Educational Fund (414) 351-9283 jmbwave@aol.com

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

SESSION LAW 2008-210 SENATE BILL 2081

AN ACT TO REQUIRE REPORTING OF INVOLUNTARY MENTAL COMMITMENT TO THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM; AND TO PROVIDE FOR A RESTORATION PROCESS TO REMOVE THE COMMITMENT BAR TO THE PURCHASE, POSSESSION, AND TRANSFER OF FIREARMS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 122C-54 is amended by adding the following new subsection to read:

"(d1) After a judicial determination that an individual shall be involuntarily committed for either inpatient or outpatient mental health treatment pursuant to Article 5 of this Chapter, the clerk of superior court in the county where the judicial determination was made shall, as soon as practicable, cause a report of the commitment to be transmitted to the National Instant Criminal Background Check System (NICS). Reporting of an individual involuntarily committed to outpatient mental health treatment under this subsection shall only be reported if the individual is found to be a danger to self or others. The clerk shall also cause to be transmitted to NICS a record where an individual is found not guilty by reason of insanity or found mentally incompetent to proceed to criminal trial. The clerk, upon receipt of documentation that an affected individual has received a relief from disabilities pursuant to G.S. 122C-54.1 or any applicable federal law,

shall cause the individual's record in NICS to be updated. The record of involuntary commitment shall be accessible only by an entity having proper access to NICS and shall remain otherwise confidential as provided by this Article. The clerk shall effect the transmissions to NICS required by the subsection according to protocols which shall be established by the Administrative Office of the Courts."

SECTION 2. Article 3 of Chapter 122C of the General Statutes is amended by adding the following new section to read:

- "§ 122C-54.1. Restoration process to remove mental commitment bar.
- (a) Any individual over the age of 18 may petition for the removal of the mental commitment bar to purchase, possess, or transfer a firearm when the individual no longer suffers from the condition that resulted in the individual's involuntary commitment for either inpatient or outpatient mental health treatment pursuant to Article 5 of this Chapter and no longer poses a danger to self or others for purposes of the purchase, possession, or transfer of firearms pursuant to 18 U.S.C. § 922, G.S. 14-404, and G.S. 14-415.12. The individual may file the petition with a district court judge upon the expiration of any current inpatient or outpatient commitment. No individual who has been found not guilty by reason of insanity may petition a court for restoration under this section.
- (b) The petition must be filed in the district court of the county where the respondent was the subject of the most recent judicial determination that either inpatient or outpatient treatment was appropriate or in the district court of the county of the petitioner's residence. An individual disqualified from firearms possession due to a comparable out-of-State mental commitment shall make application in the county of residence. The clerk of court upon receipt of the petition shall schedule a hearing using the regularly scheduled commitment court time and provide notice of the hearing to the petitioner and the district attorney. Copies of the petition must be served on the director of the inpatient and outpatient treatment facility, in-State or out-of-State, and the district attorney in the petitioner's current county of residence.

- (c) The burden is on the petitioner to establish by a preponderance of the evidence that the petitioner no longer suffers from the condition that resulted in commitment and no longer poses a danger to self or others for purposes of the purchase, possession, or transfer of firearms pursuant to 18 U.S.C. § 922, G.S. 14-404, and G.S. 14-415.12. The district attorney shall present any and all relevant information to the contrary. For these purposes, the district attorney may access and use any and all mental health records, juvenile records, and criminal history of the petitioner wherever maintained. The applicant must sign a release for the district attorney to receive any mental health records of the applicant. This hearing shall be closed to the public, unless the court finds that the public interest would be better served by conducting the hearing in public. If the court determines the hearing should be open to the public, upon motion by the petitioner, the court may allow for the in camera inspection of any mental health records. The court may allow the use of the record but shall restrict it from public disclosure, unless it finds that the public interest would be better served by making the record public. The district court shall enter an order that the petitioner does or does not continue to suffer from the condition that resulted in commitment and does or does not continue to pose a danger to self or others for purposes of the purchase, possession, or transfer of firearms pursuant to 18 U.S.C. § 922, G.S. 14-404, and G.S. 14-415.12. The court shall include in its order the specific findings of fact on which it bases its decision. The decision of the district court may be appealed to the superior court for a hearing de novo. After a denial by the superior court, the applicant must wait a minimum of one year before reapplying. Attorneys designated by the Attorney General shall be available to represent the State, or assist in the representation of the State, in a restoration proceeding when requested to do so by a district attorney and approved by the Attorney General. An attorney so designated shall have all the powers of the district attorney under this section.
- (d) Upon a judicial determination to grant a petition under this section, the clerk of superior court in the county where the petition was granted shall forward

the order to the National Instant Criminal Background Check System (NICS) for updating of the respondent's record."

SECTION 3.(a) G.S. 14-404 is amended by adding the following new subsection to read:

"(g) An applicant shall not be ineligible to receive a permit under subsection

(4) of subsection (c) of this section because of involuntary commitment to mental health services if the individual's rights have been restored under

G.S. 122C-54.1."

SECTION 3.(b) G.S. 14-415.12 is amended by adding the following new subsection to read:

"(c) An applicant shall not be ineligible to receive a concealed carry permit under subdivision (6) of subsection (b) of this section because of involuntary commitment to mental health services if the individual's rights have been restored under G.S. 122C-54.1."

SECTION 4. The Administrative Office of the Courts may use up to twenty-five thousand dollars (\$25,000) of funds within its budget for the 2008-2009 fiscal year to carry out the provisions of this act.

SECTION 5. Sections 1 through 3 of this act become effective December 1, 2008. Section 4 of this act becomes effective July 1, 2008. The remainder of this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 18th day of July, 2008.

s/ Marc Basnight

President Pro Tempore of the

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Senate

s/ Joe Hackney

Speaker of the House of

Representatives

s/ Michael F. Easley
Governor

Approved 9:52 a.m. this 9th day of August, 2008



JIM DOYLE Governor

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February 8, 2010

Senator Lena Taylor Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing Committee Chair Room 415 South State Capitol P.O. Box 7882 Madison, WI 53707-7882

Dear Chairperson Taylor and Members of the Committee:

Thank you for your consideration of Senate Bill 44 and for the opportunity to provide the committee with information regarding the fiscal impact to the state should statutory changes not be enacted.

The Office of Justice Assistance (OJA) applies for federal competitive grant opportunities on behalf of the state, and receives and administers funds allocated to states under several major federal criminal justice grant programs including the Byrne Justice Assistance Grant (JAG).

Passage of the proposed SB 44 is necessary for the state to meet eligibility requirements in order to apply for the federal National Instant Criminal Background Check (NICs) grant program, to take advantage of a waiver of state matching funds under the National Criminal History Improvement Program (NCHIPS) grant program, and to avoid mandatory penalties that will result in a 5% cut to the state's allocation of Byrne Justice Assistance Grant (JAG) funds.

Federal requirements for information sharing

The National Instant Criminal Background Check (NICs) Improvement Amendments Act of 2007 requires states to establish a process whereby individuals that have been formally adjudicated as mentally defective or involuntarily committed can appeal to a court to have confiscated firearms returned to them.

The federal government's criteria for a qualifying process are broad. Minimally it must provide individuals with the:

- Ability to request reinstatement—the burden of proof is on the requester to convince the court that
 previous mental health issues have been satisfactorily addressed to warrant return of confiscated
 firearms.
- Court review of request—Judges must consider criminal and mental health records and granting of relief must be found to not endanger public safety or be contrary to the public interest.

Current state law restricts mental health adjudications that may be reported to the state, and prohibits that information from being shared with NICs.

Adjudications of mental defect are not currently reported to the state repository. Current State law
prohibits sharing of this data.

- Currently the State is only notified of involuntary commitments if a circuit court orders the
 individual not to possess a firearm. State law prohibits DOJ from sharing info about firearms
 prohibitions as a result of involuntary commitments.
- Guardianships and protective placements where persons are adjudicated as mentally defective are also not reported to the state.

NICs grants eligibility requirements

Wisconsin's eligibility for the NICs grant is contingent upon two items:

- 1. NICs requires states report the following kinds of mental health records for purposes of information sharing:
 - a. Findings of incompetency to stand trial (reporting requirement met)
 - b. Findings of insanity by a court in a criminal case (reporting requirement met)
 - c. Adjudications of mental defect (reporting requirement not met)
 - d. Formal involuntary commitments to mental institutions (reporting requirement not met)
- 2. Meeting federally mandated efficiency standards in terms of the number of disqualifying events (i.e. situations where firearms should be confiscated) reported to the federal government. Disqualifying events include:
 - Felony convictions
 - Misdemeanor domestic violence convictions
 - Juvenile felony adjudications
 - Mental Health Involuntary Commitments.

Passage of SB 44 would fulfill the first eligibility requirement for NICs grant eligibility, and enable the state to meet increasing efficiency standard requirements (see mandatory penalties section).

Potential financial gain for state from NICs grant eligibility

NICs grants are awarded as a competitive process—there is no ceiling set for a maximum award amount, and no federal formula that determines allocation to states.

In FFY09, available NICs funds totaled \$10 M. Last funding round twenty-two applications were submitted out of 55 possible states and territories. Only three were found eligible and were funded. The top amount awarded with \$993,000; the other two recipients received ~\$700,000 each. Each state received the amount they requested in their application.

In FYY10, there will be \$20 M available. An award of up to \$1M is not outside the realm of possibility.

Waiver of state matching funds for NCHIP grants

The 2007 NICs Improvement Act also allows states to obtain a waiver, beginning in 2011, of the state matching funds under the NCHIP grant program, if a state provides at least 90% of its records identifying persons in specified prohibited categories. Currently Wisconsin is providing ~85% of records for specific categories.

NCHIP grants require a 20% state match. In FFY09 Wisconsin was awarded \$425,000 and the amount of required match was \$106,000. In FFY08 Wisconsin was awarded \$300,000 and the required match was \$75,000.

Mandatory penalties to Wisconsin's Bryne JAG fund allocation

If the requirements of 2007 NICs Improvement Act are not met, states are penalized by reductions in federal Byrne JAG funds.

Federal law requires:

- 60% standard of reporting disqualifying events; if that is not met 3% reduction in Byrne JAG can be held back. This standard is in place until 2013.
- The standard will increase to 90% in 2013; if it is not met, 5% reduction in Byrne JAG (total
 amount state is awarded not just state share) is mandatory.

Wisconsin currently meets the 60% standard (Wisconsin is able to report 85%) largely because of reporting on felony convictions and misdemeanor Domestic Violence convictions.

Wisconsin will not be able to meet the 90% standard set to go into effect in 2013 without the ability to report mental health records. We cannot meet the standard by increasing efficiency in the other three areas.

OJA has prepared a worksheet projecting the financial consequences of a 5%, 10%, and 15% cut to Wisconsin's current level of Byrne JAG funding. A 5% cut reflects the mandatory penalty should Wisconsin not change it's statutes with regard to mental health records. A separate federal law—the Adam Walsh Act—mandates a 10% cut for non-compliance. Should Wisconsin fail to pass SB 44 and is unable to comply with Adam Walsh, a 15% cut to the total amount would result.

The Federal government allocates JAG funding to Wisconsin (administered by OJA). Eligible units of local government are awarded 40% of Wisconsin's total allocation based on a federal formula. The remaining 60% is called the state's share.

~60% of the state's share must be passed on to locals (note that the state can elect to distribute 58.5% to locals, this percentage is reflected in the 10% and 15% Byrne JAG projection) OJA uses this money to fund long-standing programs such as Drug Task Forces, several state statutory earmarks (like youth diversion), state agency justice programs (including the TAD and AIM grant programs which are awarded to locals), ADA prosecutors, and various competitive grant programs. The remaining ~40% of the state share can be used to implement state initiatives.

Awarded federal grant will cover costs outlined in fiscal estimate

OJA in partnership with the Director of State Courts and the Department of Justice has received a federal NCHIPS grant to build an interface between CCAP and DOJ's Criminal History database. The scope of the application included building in capability to receive mental health records.

The initial fiscal estimate prepared for AB 70 was done before federal grant had been awarded. The NCHIPS grant would cover the fiscal estimate almost in its entirety. There is a 20% state match requirement.

Assuming funding levels are constant, combining the potential level of funding available for eligible states under NICs, the amount saved by waiver of state match for NCHIPs grants, and the amount lost by a 5% cut in Byrne JAG funding, OJA estimates a total loss of ~\$1.35M, should SB 44 not become law.

Thank you for considering this important bill,